155-393

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~982~~. 86

LAURETTE ESTELLE HORNE, ADMINISTRATRIX OF GRANVILLE P. HORNE, PLAINTIFF IN ERROR,

vs.

THE GEORGE H. HAMMOND COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED FEBRUARY 11, 1891.

(14,477.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 13, 1894.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Laurette Estelle Horne, of Chelsea, in said district, administratrix of the estate of Granville P. Horne, late of said Chelsea, plaintiff, and The George H. Hammond Company, a corporation organized under the laws of the State of Michigan, but having a usual place of business in Boston, in said district, defendant, in an action of tort, a manifest error hath happened, to the great damage of the said plaintiff, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the eleventh day of October, in the year of our Lord one thousand eight hundred and ninety.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
Circuit Judge.

2 CIRCUIT COURT OF THE UNITED STATES, }
District of Massachusetts, } *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit

Seal of the Circuit Court, Massachusetts.

court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this eleventh day of October, A. D. 1890.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss.*:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety.

Before the Honorable Le Baron B. Colt, circuit judge.

4 LAURETTE ESTELLE HORNE, of Chelsea, in said District, Administratrix of the Estate of Granville P. Horne, late of said Chelsea, Plaintiff,

v.

THE GEORGE H. HAMMOND COMPANY, a Corporation Organized under the Laws of the State of Michigan, but having a usual Place of Business in Boston, in said District, Defendant. } 3218, Law Docket.

In an action of tort; *ad damnum*, $30,000.

The writ in this cause is dated the eighteenth day of January, A. D. 1889, and was duly entered at the May term of this court, A. D. 1889, when and where the parties appeared by their respective attorneys.

On the thirteenth day of September the plaintiff filed the following amended declaration by consent:

Amended Declaration.

(Filed Sept. 13, 1889.)

The plaintiff says that she is the widow of the late Granville P. Horne, of Chelsea, Suffolk county, Commonwealth of Massachusetts, and that she was duly appointed by the probate court of said Suffolk county the administratrix of his estate.

And the defendant says that the defendant corporation during the months of January and February, A. D. 1887, hired and chartered from the owners and agents of the British steamship Virginian a part of said steamship between the second and third deck from the upper part of the steamship, and which said part was used by said defendant corporation as a place for the keeping and transportation of beef between the ports of Boston, Massachusetts, and Liverpool, England, and was fitted up by them as a refrigerator in which to keep beef and other articles; that the full control and

management of the said part of the steamship was under the direction of the defendant company and its servants or agents, who had the right and whose duty it was to enter said refrigerator or part of the said steamship at any and all times, and for that and other purposes the said defendants had the right, under said contract or charter, to remove hatches or other obstructions in order to reach said part of the ship and the refrigerators contained therein; that the usual method adopted by the servant of the said corporation to reach said refrigerators was by going down a hatchway on said steamship known as number two hatch; and as to the said part of the ship heretofore mentioned the said defendants were independent contractors; and the plaintiff further says that Granville P. Horne, the plaintiff's intestate, contracted, on or about January 23, A. D. 1887, with the owners of the said steamship Virginian to load and unload the cargo of said steamship other than that placed on board by the George H. Hammond Company, but as to the cargo of beef on board or the part of the vessel occupied by the said George H. Hammond Company the said Granville P. Horne was in no way concerned, care and work being under the same relating to the same being under the sole supervision and control of the defendant corporation.

On or about the 24th day of January, A. D. 1887, while the said Granville P. Horne was performing his duty in unloading said steamship under his contract, as above set forth, and while in the exercise of due care, he fell through said number two hatchway, so called, leading from the orlop deck to the part of the steamship hired by the defendant corporation, where a hatch had been removed and by the negligence of the defendant corporation had remained improperly covered and unguarded.

And the plaintiff says that the said hatchway was covered by the defendant with a piece of canvas known as a tarpaulin, and said hatchway was thereby left in such condition that a person not knowing that the hatch was off would have believed it to be properly covered and secured.

And the plaintiff says that the said hatch had been removed by the servants of the defendant corporation in the regular course of their occupation.

That said hatchway had not then been properly covered by them; and the plaintiff further states that it was the duty of the defendant corporation to keep the said hatchways properly covered and also properly guarded; that it was the duty of the said defendant to properly cover all hatches on said steamship removed by its servants or agents.

That through the neglect of the said defendant the said hatch was not properly covered or guarded as it should have been, and that through the said neglect and other negligence of the defendant said accident and the damage resulting therefrom took place; and the said Granville P. Horne was severely injured by said fall, both externally and internally, his leg, hip, and arm being broken and the internal injuries being of such a nature as to be the cause of his death; that for the term of about three weeks he suffered

great bodily and mental pain and suffering, and was put to expense for medicines, medical attendance, nursing, and other expenses.

That the said internal injuries were of such a nature as to be the cause of his death.

And the plaintiff says that the said Granville P. Horne was in the exercise of due care, but that the said defendant corporation was not in the exercise of due care, but that the said accident and the damage resulting therefrom were caused wholly by the negligent act of the defendant corporation, its servants or agents.

THE PLAINTIFF,
By EUGENE P. CARVER,
Her Attorney.

This cause was thence continued to the October term, A. D. 1889, when on the fourth day of November, A. D. 1889, the following answer was filed:

6 *Answer.*

(Filed November 4, 1889.)

The defendant denies each and every allegation in the plaintiff's writ and declaration contained, and defendant, answering further, says that if any injury occurred to the plaintiff's intestate, as alleged, said injury was caused by the plaintiff's intestate's own negligence and want of due care, and not by any negligence or default on the part of the defendant, its agents or servants.

By its attorneys, RUSSELL & PUTNAM.

Issue being thus joined, the cause, after a full hearing, the Honorable Le Baron B. Colt, circuit judge, and the Honorable George M. Carpenter, district judge of the district of Rhode Island, duly assigned by the Honorable Le Baron B. Colt to hold said circuit court, sitting, is committed to a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same returned their verdict therein and upon oath said, "The jury find for the defendant."

This cause was thence continued to this present May term, and now, to wit, September 23, 1890, it is considered by the court, the Honorable Thomas L. Nelson, district judge, sitting, that the said Laurette Estelle Horne, administratrix, plaintiff, take nothing by her said writ, and that the said The George H. Hammond Company, defendant, recover of the said Laurette Estelle Horne, plaintiff, its costs of suit, taxed at sixty-six dollars and thirty cents.

The following bill of exceptions was presented by the plaintiff and allowed as of the day of real and before verdict was remitted:

Plaintiff's Exceptions.

This was an action of tort to recover damages for personal injuries to the plaintiff's intestate, Granville P. Horne, January 24, 1887, by falling through a hatchway on board the steamer Virgin-

ian, which hatchway, it was claimed by the plaintiff, was left open and unguarded by the negligence of the defendant. The writ is dated January 18, 1889. The pleadings are made a part of these exceptions. Three plans of the steamer Virginian used at the trial and marked respectively 1, S. H. H., 2, S. H. H., 3, S. H. H., may be referred to.

At the trial the plaintiff offered the following testimony:

JOHN C. RUSSELL: Am a longshoreman, engaged in stevedoring, and have been for about 32 years; am now 55 years old; worked as foreman in loading and discharging the Leyland line of steamers; have worked under Granville P. Horne about 10 years on that line; have worked on board the steamship Virginian from the time she was built until about three years ago.

All the hatches of the steamer as shown on the plans have iron combings which stand about 12 inches high from the deck
7 and are about an inch thick. The hatches are made of wood. A strong-back in the middle separates the hatches from one another. The hatches lie on the strong-back. Think that in No. 2 hatch there were 5 hatches on a side; they are taken off by rings in the corners; should think that each hatch in No. 2 hatch was pretty near 5 ft. long by 2 ft. to 2 ft. 4 in. width.

On the afternoon of the day of the accident worked on the steerage deck at No. 2 hatch. The steamer (Virginian) was then lying on the north side of the Hoosac Tunnel dock, Charlestown, port side next the dock. She had then been lying there some three or four days; day of the accident she was loading—about half loaded.

The spar deck is the first deck, the steerage deck the second, and the orlop deck the third. In the afternoon of the day of the accident we were taking in cotton on one side and bacon on the other; boxes of bacon. We took the bacon and cotton down through No. 2 hatch to the steerage deck, landing it on the hatch, and trucked them forward to No. 1 hatch and stowed them. The cotton went aft and the bacon forward. I was foreman in charge of this operation. We worked till 6 o'clock, then went home and got our supper and were ordered by Granville Horne to be back at 7.30. It rained that afternoon, and at 1 o'clock I ordered the men to put the hatches on No. 2 hatch on the steerage deck so as to take in cotton. They did so. I saw the hatches put on and two tarpaulins put over them to cover them so that no water could get down below; then we went to work and worked till 6. After the hatches were put on I worked on them myself; went across them at different times; was on No. 2 hatch myself between 5 and 6 o'clock that afternoon a number of times. It was my business to be to and fro on the wharf and down between decks and down in the hold, etc.

Returned from supper at half past 7; commenced to take in bacon down through No. 2 hatch on the spar deck to steerage deck; wheeled it forward on the trucks to No. 1 hatch on the steerage deck and lowered it down through the hold; at the same time there was an engine hoisting over No. 1 rail. There were two gangs of men at work at No. 1 hatch. We had not used No. 2 hatch on the

steerage deck after one o'clock on that day to lower anything down below the steerage deck. The only use we made of it was to land cargo upon it and to truck it forward. I had charge of the gang which was working at No. 2 hatch. I was on the No. 2 hatch steerage deck after I returned from supper. The deck of the steamer was lighted by lamps, candles. When I returned from supper the appearance of No. 2 hatch was just as we had left it—that is, as far as I was concerned I did not see any difference; was on No. 2 hatch after I came back from supper and before the accident to help the men to move the bacon into the trucks once in awhile; 7 or 8 times, probably. The tarpaulin was over the hatch; did not see that any part of the hatch was uncovered; if it had been I should have covered it to save them from getting wet below; should have put the hatch on if I knew the hatch was off, and if the tarpaulin was not over the hatch I would have hauled it over. None of my men, to my knowledge, went down No. 2 hatch from the steerage to the orlop deck after supper that night before the accident.

We were taking in the bacon through No. 2 hatch and taking it forward, and at the time that Horne fell I was down in No. 1 hold when a man by the name of Donovan sung out to me,
8 "Somebody has fell down the hold." I ran up as fast as I could and got to this No. 2 hold, and when I got down I struck a match, and I think there was Mr. Haseltine down there, and I says, "What is the matter?" He says, "Keep quiet; everything is all right." We got a lamp and a hatch slung and laid him on it and hoisted him on the deck. He was on the starboard side of No. 2 hatch when I found him on the bottom of the hold. The distance from the spar deck to the bottom is about 33 feet, or about 26 feet from the steerage deck. We hoisted Mr. Horne up by the winch, took him ashore on the hatch, carried him over into the office and sent for the doctor.

Cross-examination:

On this occasion the lower hold had not been loaded. At the time we were getting in the cargo on the orlop and steerage decks. It was empty. It was to have taken a cargo of grain. My impression is that the meat had not been loaded on the orlop deck at the time of the accident. We were taking both cotton and the bacon off of the wharf. The cotton was stowed on the steerage deck aft; the bacon was lowered into the orlop deck forward. The cotton was loaded at the after end of the No. 2 hatch alternately, one bale on the port side and one on the starboard side of the hatch, and the men on the port side of the hatch would take their bale and wheel it aft and men on starboard side of hatch would take their bale and wheel it aft. The bacon was all loaded on the port side of the steerage hatch and wheeled forward to No. 1 hatch, then lowered and stowed part on one side, part on the other, to trim the ship; had taken off the orlop-deck hatches after we got the steerage deck discharged to work down in the lower hold. This was

when we were discharging the ship. When they took in ice for the refrigerators they notified us in the afternoon that they were going to ice; then we put on these orlop-deck hatches. When the ice is all in, in the morning, if we have anything to do in the lower hold, we take the hatches off again. To the best of my knowledge the orlop-deck hatches had been put on for the purpose of getting the ice in, and we had taken them off again to go into the hold.

When Mr. Horne fell he must have gone through the open orlop hatch and struck on the shifting boards and braces in the hold below. The shifting boards run lengthwise of the hold, and reach from bottom of hold to orlop deck. The braces run from the shifting boards to side of ship.

We came back at 7½ and worked only on loading bacon. We loaded no more cotton that night. We loaded bacon, as before, on port side of ship, and wheeled it forward from No. 2 to No. 1 hatch on the port side, and at the same time took it over the side forward into No. 1 hatch, working two gangs. I had 32 men employed on the night of the accident. There were two gangs; Mr. Hazeltine had charge of one and I of the other. The orlop-deck hatches had been taken off and left off at No. 2 hatchway, because we expected to get grain in. If the grain had come we should have taken off a portion of the No. 2 hatch on the steerage deck and put the pipe down and loaded the hold through the No. 2 orlop hatch, at the same time continuing to use No. 2 steerage hatch to load the bacon.

9 WILLIAM H. LINCOLN: Am agent of the Leyland line of steamships, doing business under the firm of Thayer & Lincoln. We have been agents for this line nearly 14 years; it consists of several steamers running between Boston and Liverpool; the Virginian is one of that line; she carries about 4,000 tons of measurement cargo and is, I think, about 2,500 tons register; she is about 400 feet long, 35 ft. deep; she has three decks, the spar deck, the steerage deck, and the orlop deck, the spar deck being the same as the main deck; the distance from the spar deck to the bottom of the hold is about 30 feet, the space between the spar deck and the steerage deck about 7 feet, and between the steerage and the orlop deck about 6 feet.

In January, 1887, the Virginian was lying at the Hoosac Tunnel dock, Charlestown. I had at that time a contract with the defendant company by which they hired and occupied a part of the vessel. The contract was not in writing. I made it, I should think, about two or three years before the time of the accident. Originally we had a contract in writing with the George H. Hammond Co.; that was a good many years ago, and then they, after pursuing the business for about two years, gave it up. Then we made a written contract with Swift & Co., who took the refrigerator boxes. They continued for several years and finally relinquished it. Hammond & Co. bought the boxes of them and renewed their shipments. That is the reason why this last contract was not in writing, because the terms had been understood. The

terms of the contract in force January, 1887, were that the defendants were to load and discharge the refrigerators; that they should furnish the necessary ice for the preservation of the meat, and also attendants to take care of it during the voyage, and that we should furnish free passages out and home for the attendants. They paid a certain rate of freight which was subject to change. They occupied the orlop deck each side of the hatch, extending forward and aft, I should say, 70 or 80 feet. The total capacity was about 400 tons.

Hatch No. 2 was about 20 feet in length and the space occupied by the defendant company extended both forward and aft, occupying the entire width and height of the vessel on the orlop deck. The space was covered around the hatchway and extended from one to two feet from the combings of the hatch, giving room for the men to pass around and stand when the hatch is open. The refrigerator doors open inward. There was no access to the space occupied by the defendants except through the doors and No. 2 hatch. I do not remember how many of these doors there are.

The defendant company provided its men and they put its ice and meat aboard; then they sent two men to Liverpool in charge of the ice and meats. On the way back we had the right to fill the space with cargo. We had nothing to do with the employment of the men who had charge of the refrigerators, and had no right under the contract to use any of the space enclosed between the casings and the side of the ship on the orlop deck on the voyage from Boston to Liverpool. I knew Granville P. Horne and had employed him as stevedore for 7 or 8 years before the accident under the written contract which I here produce.

(This contract is annexed to these exceptions, marked Ex. A.)

10 THOMAS SULLIVAN: Have been employed as longshoreman and stevedore for about 9 years; have worked several times on the steamship Virginian. There are 5 hatches on the ship. Knew Granville P. Horne and was working on the ship in his employment at the time of the accident; commenced work at 7 in the morning on No. 2 hatch. In the afternoon commenced at No. 1 hatch, on the orlop deck; went home to supper at 6 o'clock and came back at half past 7; continued to work on No. 1 hatch; did not work on No. 2 hatch, on the steerage deck, at any time during the day. After I came back from supper I went to work at No. 1 hatch. Mr. Horne came to the combings of the hatch and made some remark to me about the freight we were storing. A very few minutes afterwards he fell down No. 2 hatch. I ran out on the orlop deck, with a light in my hands, round to No. 3 hatch, on the steerage deck. I found the hatch off. There are 7 compartments in No. 2 hatch, on the steerage deck. The hatch which was off was the starboard after hatch. I went down the hatch on the steerage deck. Going down I found the tarpaulin was off. It fell down, hanging in between the corners of the hatch and the combings. In going down I swung against this tarpaulin and the wind of it knocked my hat off and blew the light out. With that I called to

Mr. Horne and I asked him where he was. He said, "I am here, Tom," recognizing my voice, I suppose. I followed the sound down and I found him on the starboard side in the lower hold. He complained of great pain in his chest and of his back and he spat out a little blood. He said his leg was broken. About this time the men had come and taken off the hatch and slung it and got it down, preparatory to getting him up. There were two men down there beside myself, and we put the splinters on his legs and hoisted him up. A man went up with him on the hatch to keep him from coming against the combings. We got him onto the dock and into the office on the dock; never saw Mr. Horne again. There are ladders connecting the two decks between the hatches on the port side of the ship in No. 2 hatch.

There were four gangs of stevedores working on the Virginian that night. One took the freight down through No. 2 hatch; another took it along the steerage deck into No. 1; No. 3 gang was working at their own hatch, whether No. 4 or No. 5 hatch I would not be positive, and there was also a gang working down at the lower end of the ship. When I heard of the accident I went up the ladder from the orlop deck to the steerage at No. 2 hatch, then went along the steerage deck towards No. 2 hatch; found that one of the hatches of No. 2 hatch was off and a few of the shifting boards. The tarpaulin spread over the entire hatchway, with the exception of this corner where I have said the tarpaulin was hanging down. I was with Mr. Horne two or three minutes, I suppose, before the light came; cannot exactly tell.

Cross-examination:

Mr. Horne was the foreman and all the rest of us worked under him. There was nobody present that night who was over him; everybody obeyed his orders. I knew that the meat men were in the habit of coming down to the refrigerator, but how often I do not know. I was not supposed to know anything about it. I have seen them coming down. I see them coming down morning,
11 afternoon, or night, but it was their real line of business to come. I did not know anything about it. They always put on the hatches when they came up again after going down; they were always supposed to. They did not put them on this night, I suppose. They did not usually leave the hatches off for the stevedores to put them on; they always put them on to my knowledge. I do not remember saying at the last trial that sometimes they put them on and sometimes they did not. It is not true that sometimes they put them on and sometimes they did not. I do not remember saying at the last trial that when they did not put the hatches on the stevedores did if they were working there; have never seen the stevedores put the hatches on when they were left off by the meat men. If there was a hatch off and they were going to work they would put it on. Have known of the meat men leaving the hatch off. When the meat men went below and left the hatch open to the knowledge of the stevedores the stevedores have put it on, and

when the meat men have wanted to come up they have knocked and we took it off; do not remember of the stevedores ever putting the hatch on after the meat men came up.

ROBERT CALLAHAN: Have worked as stevedore on the Leyland line about 4 years; was working on the Virginian under Mr. Horne the day of the accident. The forenoon we were discharging the ship and got through with that in the forenoon. In the afternoon was working on the steerage deck at No. 2 hatch. I was landing loads when they came down on the deck. I was standing on the port side forward on the No. 2 hatch on the steerage deck. I saw the hatches on No. 2 put on at 1 o'clock; I helped to put them on. The whole gang was there. There were 7 hatches on each side on the No. 2 hatch. All the hatches on No. 2 hatch were put on at 1 o'clock, and after they were put on we put a tarpaulin or two over the hatches, which covered the hatches entirely so that none of the hatches could be seen without taking off the tarpaulin. I worked at No. 2 hatch all the afternoon, from 1 o'clock till I went to supper. No part of the No. 2 hatch on the steerage deck was taken off until I went to supper at 6 o'clock. I believe all of the stevedores went to supper at that time, all of our gang, all who were working with me. We got back to work again at half past seven. I commenced at No. 2 hatch on the steerage deck; went to work on bacon again the same as usual. I landed the bacon standing on the hatch forward on the port side. As I was going down No. 2 ladder I saw a light in the orlop close to the starboard after hatch underneath the hatchway. I saw it looking down as I was coming down the ladder. It seems the tarpaulin was not close up to the combings of the hatch at that time. I did not mind anything about any opening. I could see the light on the orlop deck because the hatch was off. The after hatch was off at that time; I mean the starboard aft-corner section of the hatch was off. After I came down I went right to work in about five or ten minutes. Several of the others came down when I did and we went right to work in about five or ten minutes. I never minded the light any more after that. After I got to work I did not bother with it because I did not happen to go out to that side of the hatch at all. Our work was on the port side. I did not report that light to anybody. I kept working there and saw Mr. Horne come up there once or twice.
12 He came up the ladders from the No. 1 and No. 2. He is always flying around, you know, when the men are working, saying, "Hurry up, boys," or something like that. I saw him come down the ladder at the time he fell. He came right down the ladder and turned right off with his foot on the starboard and went right down in the hold. The accident happened at about half past 10 at night. The tarpaulin then seemed to be all over the hatches. It was kind of a cold night, and the water from the bacon dripping on them, they were kind of stiff. I never minded the light from the orlop deck after I first came. I see the light at 7 o'clock or 10 minutes past 7, or 20 minutes past 7, I should say. I could not say whether the hatch continued open after that time or not. I could

not swear to that. When I saw Mr. Horne go down into the hold I reported it to Mr. Donovan, the hatchman, and he went down. I went to taking off the hatches so as to make room for Mr. Horne to be brought up. We found one hatch off the starboard hatch aft. We found it on the starboard side, right close to the combings. When we commenced to take the hatches off the tarpaulin on the corner was dipped down in the hold where the hatch was off. We took off the tarpaulins. I couldn't swear whether there was one or two. No other hatch was off except this one. I see Mr. Horne brought up from the hold slung on the hatch, and one of the men coming up with him. I never saw him afterwards.

Cross-examined:

I got down to the steerage deck at about 20 minutes past 7 that evening and waited till half past; went to work on port side forward end of hatch. It wasn't time to start up. I couldn't say that any of the rest of the gang in No. 2 had got there before me. There might have been some at No. 1 hatch. When I went down I noticed a light glimmering under this aft-starboard corner of the hatch, and I saw that the hatch was off. The tarpaulin was spread over it, but it was not close up to the combings of the hatch; it was pretty well laid over it. I never knew anything more about it before I went down the hold. When I went to put on the hatches after taking them all off, first noticed that this hatch on the starboard hatch aft was lying where it was. It took two of us to remove the hatches. Some of the men went down to find Mr. Horne before we had taken the hatches off. Mr. Sullivan, Mr. Haseltine, and I believe Mr. Donovan. The tarpaulin was stiff with rain and with the dripping of the bacon that had fallen on it. The drippings of the bacon would have gone down through into the hold if the tarpaulin had not been swung over. That is the reason they were swung over, to keep the wet out of the holds. I could not say whether the men who went down there while we were away, if there were any, swung the tarpaulins over their heads after they had gone down. I could not say whether any of the stevedores swung it over afterwards. Mr. Horne had been up and down that hold (*i. e.*, to the steerage deck) several times before that evening. He was back and forth, up and down that hatchway all the time. Donovan was hatchman. He stood on the deck above to guide the fall as the bacon was let down. I said to him, "Donovan, Gran. has gone down the hold." None of us had any occasion to work on the starboard side of the hatch that evening. The bacon came down
13 on the port side and was wheeled forward on the port side. If I had thought that we would be working on the starboard side that night, of course I should have put the hatch on. Our work was up forward, on the port side. I did not suppose there was any danger of any body getting down through, and so I did not put it on. If we had been working as we were before 6 o'clock we would of course have put on the hatch if we had noticed it, and would have done so even if some body had been down below in the hole. Immediately

after I had called to Donovan that Gran. had fallen I went to taking the hatches off. Sullivan and Russell got started down before I took the hatches off at all. While they were getting the news and coming I was getting the tarpaulin off. They got down before there was a hatch off at all. Mr. Horne was foreman of all the stevedores.

Redirect:

There were about four persons on No. 2 hatch, on the steerage deck, when Mr. Horne fell through.

JOSEPH BRUCE: Am in the employ of the defendant company, and was in their employ at the time of the accident; had then been in their employ about a year. I was in charge of the beef that was coming aboard the Virginian. It was Mr. Buckner's duty to load the beef. I was in charge of it in going across to England from Boston. I filled the ice refrigerators with ice and salt in order to cool the boxes off, to get the temperature down ready for the beef. Tom Clark worked with me. The beef had been loaded the night before the accident; I had nothing to do with that. The ice had been put into the receptacles before the meat was brought aboard. The men who put the ice aboard in the first place filled the receptacles and then afterwards I had charge of them. The day before the accident was the first time that I had charge of the ice on this trip. There were bars across the doors leading into the refrigerator compartments; no bolts, only on the hinges. No person except Mr. Buckner and myself had access to this place after the beef was loaded. I had to cut up the ice fine and put it into these ice receptacles and put salt on it, and that cooled the boxes inside. We then had somewhere about 1,200 quarters of meat aboard. About 60 tons of ice had been put aboard. I was at work on the ship the morning of the accident, charging up the tanks, filling these ice receptacles; went down to the refrigerators through No. 2 hatchway; in the morning I believe it was open; went down the ladder; came away at some time before noon; after that did not go to the ship until the evening; went there about 6 o'clock; Clark was with me; he was also in the employ of the Hammond Co. We went to fill these tanks. When we arrived at the ship none of the stevedores were there; they had gone away. Stevedores were at work there when I went there in the morning, and the ship was then in the process of loading. When I came at 6 o'clock I went down No. 2 hatch into these ice alleys. All the hatches on the No. 2 hatch steerage deck were then on. I removed the aft starboard hatch. I took the tarpaulin and spread it back and laid the hatch on top of the tarpaulin. I turned the tarpaulin back. The
14 tarpaulin was spread back on the top of the other hatches. I did not put the hatch section on the deck. I left the hatchway open, I suppose, about 2½ feet by 5, or something like that. Clark and I went down into the ice alleyways to fill the tanks. We had candles which we lighted after we got down. There was an electric light burning on the wharf which shone down

on the wharf and gave us light on the between deck and this steerage deck. It was after 6 when we got down to the orlop deck. Clark and I went into the ice alleways and stayed there about two hours. During that time we were about our business attending to the ice. Clark came out ahead of me. I do not know how long ahead of me; did not know when he came out; did not see him come out. When I was ready to come I was alone and came up alone. When I came up from the orlop deck to the steerage deck I did not put back the hatch. I went to my room on the ship and changed my clothes and then left the ship. Was in my room probably about 20 minutes, so that I left the ship at about half-past 8 o'clock. We put out the candles which we had on the orlop deck before we came out, and after we had done so no light was left burning on the orlop deck. It was dark there. When I came up I noticed the stevedores were at work working right on the hatch; did not notice Granville Horne; knew him personally; did not see him as I came up; did not say anything to him about the hatch being off; did not state to him that the hatch was off or mention it to anybody. I knew nothing of the accident that night. Clark is not now in the employ of the defendant company.

Cross-examined:

The beef was put in the day before the accident. The accident was Monday, the 24th of January. The beef may have been put in Sunday. We have done so quite frequently. Whenever the beef was put in I immediately began to fill up with the ice, that is, as soon as the beef is put in it becomes my duty to go down morning and evening and charge up the ice receptacles with ice. I went with the ship; do not think I signed the ship's articles at that time; that is a more recent thing. The refrigerators extended the whole width of the ship forward and aft, and on both sides of the orlop No. 2 hatch. There were beef doors to go in and ice doors, three of each. One of the beef doors was on the after starboard corner just as you went down, and one right on the port side. One was on the starboard side forward. There were two ice doors on the port side running forward and aft, one door going into the forward ice alleyway and the other going aft. The ice alleyways run lengthwise on the refrigerator, dividing it into two parts, so that the refrigerator had a starboard side and a port side. The ice alleyway was kept full. The receptacles which we charged with ice and salt were in the alleyways. We got at them in the ice alleyways. We left a little space, room enough to get in. The ice receptacles were made of galvanized iron and projected into the refrigerators from the ice alleyways. We could go into the ice alleyways and put salt and ice into these galvanized iron receptacles, and then the surfaces of the receptacles were exposed to the sides of the refrigerators. When the ice and salt had melted out of them we filled them again. They had to be filled morning and evening, and they had to be filled during the whole voyage. I left one light outside of the refrigerator to give light up through. I left it outside so that

it would shine up through and any person on deck could see it. When I went down this starboard corner of the hatch I did not pull the tarpaulin over it. I left it all open. I left the hatch cover, the section of that corner, lying on top of the other hatch coverings, with the tarpaulin under it. When I came up I did not take any particular notice as to where the hatch covering and the tarpaulin were. There was nothing to obstruct my going up when I went. I have been down there before when the stevedores were at work and they have covered me up after I had gone down.

HENRY HASELTINE: Have worked as longshoreman for a stevedore 14 years. Employed by Granville P. Horne helping to load and unload the Leyland Line steamers. Was a foreman under Mr. Horne at the time of the accident. In the afternoon I was trimming grain. I was down in the hold trimming grain. Came up about 4 o'clock in the afternoon. After that went to work on the steerage deck, abaft No. 3 hatch. Left for supper at 6 o'clock. Returned at half-past 7. Went to work at No. 3 hatch again on the steerage deck. Went down the ladder through No. 3 hatch. I did not work at No. 2 hatch at all. The day was rainy in the forenoon, but after 7 o'clock it began to freeze and it froze hard. They expected grain for No. 2 hatch that day and did not get it, so they put on the No. 2 steerage-deck hatches so as to work two gangs in No. 1 hatch, because No. 1 was behind. It was the last hatch to be finished, and they worked a gang in No. 2, trucking bacon through the 'tween decks. About 10 minutes before the accident happened Mr. Horne was aft with me — something about the cargo. He was down at No. 3 steerage. He could not get through from there to No. 2 steerage. He would have to go up No. 3 hatch and come down No. 2. He would have to go along the main deck to No. 2 hatch. He had left me about 10 minutes, and I had come on deck to go ashore for something when I heard the hatchman hollo-ing that a man had fallen down the hold, so I ran forward and went down the ladder of No. 2 hatch as quickly as I could, and found there was a hatch off there. I did not wait to take any more off, and I went down, and on the way down that tarpaulin was froze stiff; it was down the hatch where somebody had carried it, and when I got down the hatch I swung myself down underneath the fore and aft piece and got on the ladder, which is on the port side of the ship—the ladder is—and then I went from the shifting boards down into the starboard side, where he was lying in the hold. The aft hatch on the starboard corner was off. The tarpaulin was hanging down the hatch. It was naturally stiff. It was a cold night, and those tarpaulins were chock full of tar, and they will get naturally stiff. One man had gone down ahead of me. None of the hatches of No. 2 hatch, except the ane where I I went down, was off. Nobody was then taking off the tarpaulins. Sullivan was the man ahead of me. I found Mr. Sullivan down there, and he had Mr. Horne sitting up. He had his two arms around him. When I went down there were no lights. I assisted to take Mr. Horne up on the hatch.

16 Cross-examined:

We had two common oil lamps when went down below—lamps without chimneys. They are the kind that stevedores use under certain circumstances. If they are working on cotton of course they use lamps with chimneys; if they are working on bacon the naked lights would show better without the globes. I could not tell what the stevedores were using before I went down. I did not take any lights down. Two naked lights were passed down to me. In the afternoon I was in the hold trimming grain at the No. 3 hatch and I was working at the same place in the evening. I was the head of the gang which worked there. We were taking in half barrels of lard for Mr. Squires. I had seen Mr. Horne there about 10 minutes before the accident. I had seen him passing around going along the way to No. 2 hatch about half an hour before the accident and spoke to Mr. Horne. He was down in No. 2 hatch then, going forward towards No. 1. He was on the ladder going down and he got down while he was talking to me and I stood on the deck and talked with him while he stood on the hatch. He said he would be up in a few minutes; that was all. That was about half an hour before the accident, and I went up to my work and he came up again and went down afterwards. I started from the main deck when I first heard of the accident and went straight down. I was standing by the No. 3 hatch on the main deck. I heard a man holloa that there was a man in the hold hurt. I ran right to No. 2 hatch and went straight down the ladder.

JOHN DONOVAN: Am a longshoreman and have been engaged in stevedoring a little over 9 years; was employed by Granville P. Horne in loading and unloading the Leyland steamers. On the afternoon of the accident I was on the spar deck, over No. 2 hatch. My duties were those of hatchman, taking up the cargo and loading the cargo, taking it up out of the hold and passing it over to the engineer. We got through unloading at about half past 11; were told to put on the steerage-deck hatches, so as to put freight in No. 1 hatch. I did not help to put the hatches on No. 2 hatch steering deck; No. 2 gang put them on. I saw them put them on. All the hatches of No. 2 hatch steerage deck were put on and the tarpaulin, either one or two, at about half past 11. All the afternoon I worked on the main deck; left for supper at 6 o'clock and got back about 20 minutes past 7; did not go down upon the steerage deck until after the accident. About two seconds before Mr. Horne fell I saw him over the hatch, looking as if he was going down the ladder from the main deck to the steerage deck through No. 2 hatch. He was just standing over the ladder and I looked round for a load of bacon that was coming in and he was gone before I looked again. I went down the steerage deck. I went forward to No. 1 hatch, where Russell, the foreman, was, and told Russell that Gran. had fallen down the hold. Callahan told me he fell. I could not say whether I went down the ladder No. 2 or leapt down. When I got down into the steerage deck found that the after hatch No. 2 hatch was off. I could not say about the tarpaulin

how it was. Sullivan and I went down the ladder and when we got down between the steerage and orlop decks the light
17 went out and I came up to get a light. I crept down the after hatch and crept in on a cross-piece; came up then for the doctor. The hatches were all on when I went to supper at 6 o'clock. When I got back there was a light on the orlop deck, and I could see it because the hatch was off and the light was there for quite a while, and I thought the refrigerator men were in there. I thought if they were through they would put the hatch on, so I could not tell whether they were through, and even when he fell I did not know whether they were through.

Cross-examined:

Where I stood at the forward end of the No. 2 hatch I could see that this after starboard corner of the hatch was off. There was an electric light on the dock over my head. I saw that the hatch was off when I got there at half past 7; I saw it was off just before Horne went down. When Callahan sung out to me that Gran. had fallen down the hold I knew just what he meant, and when I went and reported to Russell that he had fallen down the hold I meant that same hatch. Russell did not ask me to explain what I meant when I said that Horne had fallen through the hole. I was on the spar deck when I learned that he had fallen. My position as hatchman was at the forward port corner of the hatch on the upper deck, and from that point I direct the sling and the tackle that let the cargo down into the hold. I looked right down into the hold when I first went there and saw the reflection of a light. I could see the men working by it down there. Sometimes we cover the hatch while the refrigerator men are down below if they ask us; they sometimes ask us; they sometimes tell us to put on the hatch. If it would not be in our way we would put on the hatch when they were below if they asked us to. If we wanted the hatch on for any purpose of our own we would put it on, although they were down below.

This was all the plaintiff's evidence except that relating to damages. The defendant thereupon moved that the court order a verdict for the defendant on the ground that there was no evidence to support a verdict for the plaintiff, and after hearing argument the court, against the plaintiff's objection and exception, so ordered.

The jury thereupon returned a verdict for the defendant, and the plaintiff then and there excepted to this ruling of the court; and inasmuch as the matters referred to and the instructions and directions of the honorable court so objected to did not appear by the record or verdict, the plaintiff prays the honorable court to set their seal to this bill of exceptions containing the several matters proved and given in the evidence and the rulings and directions of the court thereupon and exceptions thereto.

By her attorneys, ROBERT M. MORSE, JR.,
E. P. CARVER.

18 Said exceptions being proved to be true are allowed as of the day of the trial and before the verdict of the jury was rendered.

In witness whereof we have hereunto set our hands this eleventh day of June, 1890.

LE BARON D. COLT,
C. M. CARPENTER, *J.*

EXHIBIT A.

Memorandum of agreement for discharging and loading at Boston the steamships belonging to the Leyland line, made the twelfth day of July, A. D. 1883, between Granville A. Horne, of Boston, master stevedore, and the owners of said steamships, by Thayer & Lincoln, agents:

Discharging coal & salt in bulk, 38c. per ton of 2,240 lbs.
" all other cargo, 30c. per 2,240 lbs. or 40 cu. ft.
5% discount from bill.
Loading cotton, 14c. per bale.
" grain in bulk, ¼c. per bushel.
" flour, apples & other mdse., shipped in flour barrels, 3½c. per barrel.
" bales hay & straw, 10c. per bale.
" bags cattle feed & salt, 2c. per bag.
" general cargo, 40c. ton of 2,240 lbs. or 40 cu. ft.
5% discount from bill.
Labor at night, 10c. per hour in addition to above rates.
Engine labor on wharf, 75c. per hour for each engine.

The said stevedore agrees to discharge and load each of the said steamships at the above rates promptly upon her arrival in Boston; said stevedore agrees to hire and pay the necessary men for the purpose, to provide all necessary engines, fuel, lights, tackle and other appliances for the purpose, and shall have the sole and entire charge, direction and control of the work; and the owners of each ship severally agree to pay for discharging and loading the same at the rates above specified, payment for the work on each ship to be made when such ship is loaded, ready for sea. In loading and discharging the steamships of the Leyland Line the stevedore has permission to use the ship's winches, if he desires so to do, in such condition as he may find them on the ship's deck, the stevedore furnishing the men to run them; but no obligation or undertaking of any sort is assumed by the ship-owner or his agents, or is to be implied from such permission or use or from the furnishing by the ship of the necessary steam or otherwise to keep or have
19 such winches or any of them at any time in safe or fit condition for use, or to have any winches in any condition on the ship's deck; and this permission shall be construed as a mere license to the stevedore and his men to use at his or their own risk and discretion for the purposes aforesaid any winch that may happen to be on the ship's deck, without any responsibility whatever on the part of the shipowner or his agents in respect to the fitness

or safety of such winch for such use or its condition in any respect at any time.

This agreement to remain in force until the expiration of five days after notice in writing given to terminate it by either party.

OWNERS OF SAID STEAMSHIPS,
By THAYER & LINCOLN, *Agents.*
GRANVILLE P. HORNE, *Stevedore.*

A true record.
Attest: JOHN G. STETSON, *Clerk.*

The following is the assignment of errors filed by the plaintiff:

Assignment of Errors and Prayer for Reversal.

And now comes the plaintiff in the above-entitled action and says that in the record and findings thereof there is manifest error in the case, to wit:

That the said court at the conclusion of all the testimony ordered that the said action be taken from the jury and that judgment be ordered for the defendant; that on all the evidence in the case a jury would not be warranted in finding judgment for the plaintiff.

And the plaintiff claims that there was sufficient evidence to warrant a jury in finding for the plaintiff, and that the court erred in not allowing said case to go to the jury, and that the court also erred in directing verdict for the defendant.

And the plaintiff prays that the judgment aforesaid may be reversed, annulled, and held for naught, and that she may be restored to all things that she has lost by occasion of said judgment, and that she may be entitled to a new trial in the said cause, and that a new trial be ordered.

LAURETTE E. HORNE, *Adm'x,*
By ROBERT M. MORSE, JR., AND
EUGENE P. CARVER,
Her Attorneys.

20 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled: No. 3218, Law Docket, Laurette Estelle Horne, administratrix, plaintiff, *v.* The George H. Hammond Company, defendant, lately determined in said circuit court and of all proceedings therein and of the assignment of errors and prayer for reversal filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this eleventh day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

21 *Bond on Writ of Error.*

Know all men by these presents that we, Laurette Estelle Horne, of Chelsea, in the district of Massachusetts, administratrix of the estate of Granville P. Horne, late of said Chelsea, as principal, and Benjamin I. Nesmith, of Wilbraham, in said district, as surety, are held and firmly bound unto The George H. Hammond Company, a corporation organized under the laws of the State of Michigan, but having a usual place of business in Boston, in said district, in the full and just sum of five hundred dollars, to be paid to the said George H. Hammond Company, its certain attorneys, successors or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the eleventh day of October, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between the said Laurette Estelle Horne, administratrix as aforesaid, plaintiff, and the said George H. Hammond Company, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said plaintiff shall prosecute her said writ of error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

LAURETTE ESTELLE HORNE. [L. S.]
B. I. NESMITH. [L. S.]

Approved.

LE BARON B. COLT,
Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Case No. 14,477. Massachusetts C. C. U. S. No. 382. Laurette Estelle Horne, administratrix of Granville P. Horne, plaintiff in error, *vs.* The George H. Hammond Company. Filed February 11th, 1891.

Office Supreme Court U. S.
FILED.
OCT 22 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

No. 86.

LAURETTE ESTELLE HORNE,

ADMINISTRATRIX OF GRANVILLE P. HORNE,

PLAINTIFF IN ERROR.

v.

THE GEORGE H. HAMMOND COMPANY,

DEFENDANT IN ERROR.

ROBERT M. MORSE,
EUGENE P. CARVER,
of Counsel.

BOSTON:
CARL H. HEINTZEMANN, PRINTER,
234-6 CONGRESS STREET,
1894.

Supreme Court of the United States.

LAURETTE ESTELLE HORNE, ADMINISTRATRIX OF GRANVILLE P. HORNE, PLAINTIFF IN ERROR.

v.

THE GEORGE H. HAMMOND COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The suit to which this writ applies is an action of tort in the sum of thirty thousand dollars ($30,000) to recover damages for personal injuries suffered by Granville P. Horne, the Plaintiff's intestate. The original writ is dated Jan. 18, 1889, and was entered in the May term, 1889, of the United States Circuit Court for the District of Massachusetts.

The personal injuries complained of were caused by the said Granville P. Horne falling through a hatchway on board of the British Steamer "Virginian," then lying in Boston, on Jan. 24, 1887, which hatchway had been left unguarded by the Defendant.

The Steamer "Virginian" was a steamer of about twenty-five hundred (2500) tons register, four hundred (400) feet long, and thirty-five (35) feet deep. She had three (3) decks. The upper deck being called the spar deck, the next the steerage deck, and the next and lower deck being called the orlop deck. The distance from the spar deck to the bottom of the hold was thirty (30) feet, the space between the spar and the steerage deck about seven

(7) feet, and between the steerage and the orlop deck about six (6) feet.

Lincoln, Record, p. 7.

The George H. Hammond Company was under contract with the owners and agents of the Steamer "Virginian" by which it hired and occupied exclusively the space between the steerage and orlop decks on said steamer, extending both forward and aft of number two hatch. In all a space seventy or eighty feet lengthwise of the steamer.

Lincoln, Record, p. 8.

This space was occupied with refrigerators in which the Defendant Company placed meats with ice for the preservation of the meats, which were to be thus transported from Boston to Liverpool, England.

Lincoln, Record, p. 8.
Bruce, Record, p. 12.

By the contract existing between the Defendant and the owners of the said steamship on Jan. 24, 1887, the beef was to be loaded and discharged by the Defendant, and it was to furnish the necessary ice for the preservation of the meat and proper attendance to take care of the same during the voyage. The total capacity of the space occupied by it on said steamer being about four hundred (400) tons.

Lincoln, Record, p. 8.

There was no access to the space occupied by the Defendant except through number two hatch on the steerage deck. The owners of the steamer had nothing to do with the employment of the men who had charge of the refrigerators and had no right to use any of the space occupied by The George H. Hammond Company as heretofore described.

Lincoln, Record, p. 8.

Granville P. Horne, the Plaintiff's intestate, was a stevedore, who, under a contract dated July 12, 1883, with the owners of the steamers of the Leyland Line, of which the "Virginian" was one,

agreed to discharge and load their steamers while in Boston, other than the space occupied by the Defendant Company.

Copy of Contract, Record, p. 17.

He had nothing whatever to do with loading the cargo of the Defendant Company or with the space occupied by them.

Lincoln, Record, pp. 7 & 8.

On the day of the accident the Steamer "Virginian" was lying on the north side of Hoosac Docks, her port side being next to the dock.

Granville P. Horne was supervising his men loading the said steamer. The work went on until six P.M., when the men stopped work and went to supper with instructions from him to come back at 7.30. When Mr. Horne and his men left the steamer at six P.M., all of the sections of number two hatch on the steerage deck were on and the whole hatch covered by two tarpaulins.

Russell, Record, p. 5.
Bruce, Record, p. 12.

The stevedores had worked on the hatch all the afternoon prior to six P.M. and Horne had seen them there.

Russell, Record, p. 5.

A man named Buckner, in the employ of the Defendant Company, attended to the loading of the beef, which was completed the night before the accident.

Bruce, Record, p. 12.

After the loading of the meat, Joseph Bruce had general charge of the space occupied by the Defendant Company, and no person except himself and Buckner had access to the place where the beef was kept.

Bruce, Record, p. 12.

A little after six P.M., Bruce and Clark, both in the employ of the Defendant Company and in the performance of their duty, took off a section of number two hatch on the steerage deck and

went into the space controlled and occupied solely by the Defendant Company, in order to fill the tanks there with ice.

Bruce, Record, p. 12.

When this work was completed, Bruce and Clark came up through the space thus left open, but the section of the hatch was not replaced by them, so that a space of two and a half by five feet was uncovered.

Bruce was the last man employed by the Defendant Company to come up through number two hatch, and at the time that he came up none of the stevedore's men had returned from supper.

The only lights used below by Bruce and Clark were candles, and those were put out when Bruce came up, so that because of the darkness a person from above could not see whether this section of number two hatch was on or not.

Bruce, Record, pp. 12 & 13.

After supper the stevedores worked on number two hatch on the steerage deck, and could not see that any part of the hatch was uncovered.

Russell, p. 6.

Some time after this, the said Granville P. Horne, in the regular course of his business went down the ladder in number two hatch from the spar deck to look after his men, and when he stepped off the ladder on to number two hatch on the steerage deck, the tarpaulin gave way and he fell through the section of the hatch taken away and left off by Bruce, sustaining injuries for the recovery of damages for which this suit is brought.

There was also evidence to show that, after Bruce and Clark left number two hatch on the steerage deck, and the stevedores returned, the tarpaulin which was over the hatch so covered the section of the hatch which had been removed by Bruce that to a person who went on the hatch it was apparently securely covered.

See Russell, p. 6, who says, "When I returned from supper the appearance of number two hatch was just as we had left it; that is, as far as I was concerned, I did not see any difference. I was on number two hatch, after I came back from supper and before

the accident to help the men move the bacon into trucks, once in a while, seven or eight times, probably. The tarpaulin was over the hatch. Didn't see that any part of the hatch was uncovered. If it had been I should have covered it to save them from getting wet below; should have put the hatch on if I knew the hatch was off.

Thomas Sullivan, who went down immediately after Mr. Horne fell, testified as follows: "I found the hatch off. The hatch that was off was the starboard after hatch. I went down the hatch on the steerage deck. Going down, I found the tarpaulin off. It fell down hanging in between the corners of the hatch and combings, and going down, I swung against the tarpaulin, and the wind of it knocked my hat off and blew the light out."

Sullivan, Record, p. 8.

"The tarpaulin spread over the entire hatchway with the exception of this corner where I have said the tarpaulin was hanging down."

Sullivan, Record, p. 9.

On cross examination he states that if there was a hatch off and the stevedores were going to work, they would put it on.

At the conclusion of this testimony and all the other testimony as stated in the record of this case, the Court ordered a verdict for the Defendant.

I. Was there sufficient evidence to warrant a jury in finding a verdict for the plaintiff?

It is true that the burden of proving negligence is upon the Plaintiff, but if there is any evidence, the question is one for the jury.

This Court has in a recent case stated the law as follows: —

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence the question is not one of law, but of fact, and to be settled by the jury; and this, whether the uncertainty arises from a conflict in the testi-

mony, or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them."

Richmond & Danville R.R., *v.* Powers, 149 U.S. 43.

This doctrine was applied in a recent case where the ruling was against the right of the Plaintiff to recover.

Gleeson *v.* Virginia M. R.R. Co., 140 U.S. 435.

The question of negligence may be one for the jury even if there is no dispute as to the facts.

This Court in a recent case said: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only when the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the Court."

Grand Trunk R. R. Co. *v.* Ives, 144 U.S. 408–417.

If, therefore, in the case at bar there was no dispute as to the facts, yet, if reasonable men might draw different conclusions, then the case is one that should have been submitted to the jury.

It is well settled that, in many cases where accidents similar to the one at bar occur on land in stores or dwellings by reason of a trap-door or hatchway being left open, the parties having charge of the premises are guilty of negligence, and are liable for the injury which takes place by reason of it.

Elliott *v.* Pray, 10 Allen, 378 (case of a trap-door).
Gilbert *v.* Nagle, 118 Mass. 278 (case of a trap-door).
Murphy *v.* Brooks, 109 Mass. 202 (bulkhead in a sidewalk at night).
Severy *v.* Nickerson, 120 Mass. 306 (hatchway of a vessel)
Gordon *v.* Cummings, 152 Mass. 513 (case of an elevator shaft).
Parker *v.* Barnard, 135 Mass. 116 (case of an elevator shaft).
John *v.* Bacon, L.R., 5 C.P. 437 (hatchway unguarded).

Provided this accident had taken place in a building or store

under exactly like circumstances, there would be no doubt but what the Defendant would be negligent and liable to the Plaintiff for the result of his neglect.

In the case at bar, the Defendant Company claimed in the Circuit Court that the hatchway of a vessel was to be considered differently; that there was no negligence in leaving the hatchway of a vessel or any part of it open at any time, whether by day or night.

There are a number of cases decided in the District and Circuit Courts of the United States where this question had been considered by the Courts, of which the following are the leading authorities.

The "Victoria," 13 Fed. Rep. 43.
Affirming 4 Fed. Rep. 159.

In that case a workman upon the steamer was injured by falling through an open hatchway which had been negligently left open by the stevedores engaged in discharging the ship, and the fact that a fellow workman removed the light which was near the hatch. The Court held that the ship was not liable. It was stated by the Court that there was negligence on the part of the person who removed the hatch and also of the party who took away the light.

In the "Gladiolus," 21 Fed. Rep., affirmed in 22 Fed. Rep. 454, the Court says, page 418, "The leaving open a common between-deck hatchway while the vessel is lying in port, under ordinary circumstances, is not presumptive evidence of negligence on the part of the ship. The evidence in that case discloses the fact that there had been nothing done by the stevedores which should have led the Libellant to *presume that the hatch was covered*, the evidence all tending to show that the hatchway was uncovered at the time and that he should have known of the fact.

In the "Theresiana," 31 Fed. Rep. 90 (E.D. N.Y.) the Court held there was no evidence that the scuttle had been misplaced by the crew of the ship, but that the evidence tended to show that the displacement had been caused by a fellow servant of the Libellant.

In the "William F. Babcock" (N.D. Cal.), 31 Fed. Rep. 418, a stevedore fell through an open hatchway. The Court there found

that there was negligence on the part of some person other than the Libellant, but that the negligence was that of a fellow servant and not that of the officers or crew of the ship.

In the "Helios," 12 Fed. Rep. 732, the ship was held liable where the stevedore fell through a hatchway not used for the stowing of cargo. See also to the same effect:

The "Guillerno," 26 Fed. Rep. 921.

All of these cases were in the admiralty, where the judge decided both the law and the facts.

The case of Dwyer *v.* Nat'l S. S. Co., 4 Fed. Rep. 493, was one brought against the owners of a ship in behalf of a stevedore who was injured by falling through an open hatchway. The case was taken from the jury on the ground that the officers and crew of the vessel were not bound to guard a hatchway which was open after the ship had been given up to the stevedores to unload and load. In this case the following language is used, which seems to have impressed the Circuit Court in the case at bar: —

"An open hatchway on a ship, when provided with the usual combings, is not evidence of a neglect of duty on the part of the ship owner."

It should be noted that all of these cases were brought against the ship or her owners; that the point decided is merely that the fact that a hatchway is left open when the ship is turned over to the stevedores is not negligence, and that the crew of the vessel is not bound to guard the hatches that are open when the stevedores have full control of the discharge of the ship.

The case at bar, however, is not against the ship or her owner, but against an independent contractor. The hatch through which the Plaintiff's intestate fell was not being used in the discharge of the cargo, but was under the control of the Defendant Company to a certain extent. The hatchway had been securely fastened by the stevedores before they left for supper, and Mr. Horne was aware of the fact because he saw it done. A part of the hatchway was taken off in the the evening by the Defendant's agents in the Plaintiff's absence, and it was neither replaced by them nor was notice of its removal given by them to any of the stevedores, though the hatch was apparently covered and fastened as they had

left it when the stevedores returned to work. This fact alone would make the question of negligence one for the jury to pass upon.

In the case at bar, however, there is evidence tending very strongly to show that not merely was the section of the hatch taken off by the Defendant's agents, but also that the tarpaulin was left by them over the part of the hatch which was uncovered. Any action on the part of the Defendant or its servants by which the hatch was removed and placed in a different position which would be liable to cause injury, would be such negligence on its part as would render it liable.

It is a question of fact for the jury whether on all the evidence the tarpaulin was over the section of the hatch which was removed by Bruce, at the time that Mr. Horne fell through, and whether it had been placed there by the act of the Defendant or its servant.

John C. Russell testifies, "When I returned from supper number two hatch was just as we had left it. The tarpaulin was over the hatch; didn't see that any part of the hatch was uncovered. If it had been I should have covered it myself, and if I knew the hatch was off and the tarpaulin was not over the hatch, I should have put the hatch on and hauled it over."

Russell, Record, p. 6.

Thomas Sullivan testifies that he jumped down number two hatch to the orlop deck; that he found the tarpaulin over the open part of the hatch; that in going down he swung against the tarpaulin and the wind knocked his hat off and blew his light out. That the tarpaulin spread over the entire hatchway with the exception of this corner where he said the tarpaulin was hanging down. This, if believed, would, in and of itself, comprise a man-trap, and the Defendant would be clearly liable for any injury occurring to any one not a trespasser. At least there is sufficient evidence in this case to warrant a jury in finding that the defendant put this tarpaulin in such a place as to deceive a person who was in the exercise of due care.

Again, Bruce himself says that, while he was down in the space occupied by him, he always had a light, but that when he left there

at this time he put the light out, so that there was nothing to warn a person that any part of the hatch was off.

Bruce, Record, p. 13.

II. WAS THERE AS A MATTER OF LAW CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF ?

In the United States Courts the burden is upon the Defendant to prove that the Plaintiff is guilty of contributory negligence, and it will not avail as a defense unless it be established by a preponderance of evidence.

Wash. & G. R.R. Co. *v.* Gladmon, 15 Wall 401.
Indianapolis & St. L. R.R. *v.* Horst, 93 U.S. 291.

Being contrary to the rule in Massachusetts and other states where the burden of proof is upon the Plaintiff to show that he was in the exercise of due care.

Lane *v.* Cumbie, 12 Pick. 177.

Even if that rule should be applied to the case at bar, it is clearly a question of fact for the jury.

The Plaintiff's intestate had been on the hatch before six o'clock. While going down he saw men at work upon it. He knew that the hatchway had been closed.

In a recent case in Massachusetts, it was held to be for the jury to consider whether the Plaintiff was in the exercise of due care where the Plaintiff fell into a well around which there was a fifteen inch curbing.

Learoyd *v.* Godfrey, 138 Mass. 315.

In that case a police officer went into a passageway in the dark. Not being at all familiar with the premises, upon coming to an obstacle fifteen inches high, consisting of a curbing of stone and plank around a well, he steps upon and then forward through an opening into the well. Held that contributory negligence cannot be inferred as a matter of law.

In a recent case, Mr. Justice Brewer has thus stated the rule: "It is well settled that where there is uncertainty as to the exist-

ence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

Richmond & Danville R. R. *v.* Powers, 149 U. S. 43-45.

In the case at bar, it is clear from the evidence that the Plaintiff's intestate was in the exercise of due care. He had a right to presume that the hatchway on which his men were working and which he had caused to be securely covered would not be removed without his or their knowledge. He did not attempt to go into a place which was unfamiliar and unknown in the dark, but was merely overlooking his men, who were at work on this very hatch. His attention was not occupied in any special work. It is therefore clear that the question of contributory negligence in this case is at least one for the jury to pass upon.

ROBERT M. MORSE,
EUGENE P. CARVER,
of Counsel.

1-5-393

Office Supreme Court, U. S.
FILED.
OCT 29 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 86.

HORNE, *Plaintiff in Error*,

v.

THE GEORGE H. HAMMOND COMPANY, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

GEO. PUTNAM,
for Defendant.

Supreme Court of the United States.

No. 86. OCTOBER TERM, 1894.

HORNE, *Plaintiff in Error*,

v.

THE GEORGE H. HAMMOND COMPANY, *Defendant in Error*.

BRIEF OF DEFENDANT IN ERROR.

The plaintiff in error, who was also plaintiff below, brought suit as administratrix in the Circuit Court for injuries resulting in death to her husband and intestate, Granville B. Horne, who, while engaged in loading the steamship "Virginian," fell through a hatchway left open by an employee of the defendant company. The Circuit Court, at the close of the plaintiff's evidence, directed a verdict for defendant.

The "Virginian" is a freight steamer of the Leyland Line; she has three decks, — the main or spar deck, the steerage deck and the orlop. Below the orlop is the hold. On the day of the accident she was lying at her dock in Boston waiting to receive her cargo.

Hatchways, numbered from forward aft, are cut through the decks one above the other, connecting the decks with each other and with the hold. The deceased fell through hatchway No. 2, on the steerage deck. This hatchway is about twenty feet long and ten wide, surrounded by iron combings rising a foot from the deck and divided longitudinally in the middle by a narrow beam called a strong-back. The hatchway is closed by covers five feet long and about

two and one half feet wide resting on the strong-back and on the combings. The term hatch in the evidence is applied by the witnesses indifferently to the hatchway and to the hatch-covers singly and collectively.

The defendant company, who were exporters of dressed beef, had hired the space between the orlop and the steerage decks, extending about forty feet forward and aft of the No. 2 hatchway, and had fitted it up for use as a meat refrigerator. The only approach to this space was through hatchway No. 2 on the steerage deck. The defendant's employees had a right to go to the refrigerator at any time to fill the ice chambers or for any other purpose, and were at liberty to remove any hatches in order to do so.

The deceased was employed by the Leyland Company, under a contract, to load and unload the entire cargo of the "Virginian," except the ice and beef put into their refrigerator by the defendant company. He was permitted to use the ship's hatchways for this purpose, and to leave them shut or open as best suited his convenience, or that of his employees.

During the morning of the day on which the accident occurred all the hatches were open; but toward one o'clock, in order to hasten work at hatchways Nos. 1 and 3, hatchway No 2 on the steerage deck was covered and used to receive boxes of bacon and bales of cotton, which were lowered upon it from the main deck, and were then trucked to hatches 1 and 3 to be lowered into the hold. It was raining, and in order to keep the water and the drippings from the bacon from getting into the hold, hatchway No. 2, on the steerage deck, was further protected with a covering of tarpaulin.

Hatchway No. 2 on the orlop was left open ready for a cargo of grain for the hold, which was expected in the afternoon, but did not come.

Between six and seven, while the deceased and the other stevedores were away at supper, Bruce, the defendant's employee, came to fill the refrigerators with ice. To reach them he had to go from the steerage to the orlop deck by hatchway No. 2, which had been covered as above described by wooden hatch covers and tarpaulins. He removed the after-starboard hatch cover on the steerage deck, first throwing back the corner of the tarpaulin over the covered hatchway, so as to leave an opening of about five feet by two. He then put the hatch cover on the corner of the tarpaulin to keep it in place, and went down to his work. (Page 14.)

At half past seven the stevedores returned, and began work about and upon the hatch in the same manner as in the afternoon, except that they now loaded only bacon, all of which was trucked forward to hatchway No. 1. All the bacon was loaded on the port side of the hatchway, so that the starboard side, from which a cover had been removed by Bruce in going down, was not in use; and, although some of the stevedores noticed that the cover was off they did not put it on again, because, as they were not working on that side, they did not care whether it was on or off.

Bruce came up from the orlop about eight or half past, while the stevedores were at work (page 13), and almost immediately left the ship.

The deceased was upon the hatch, in the condition in which Bruce had left it, several times in the course of the evening as he went about the ship encouraging his men and supervising the work. (Pages 10, 11.) About half past ten he came down from the main deck by the ladder, which was on the port side of the middle of the hatchway, and after landing on the steerage hatch turned to the starboard side and stepped through the opening left by Bruce. (Page 10.) As the orlop hatchway beneath him was open, he fell through into the hold, a distance of some twenty feet, receiving injuries from the effects of which he died.

The gist of the amended declaration is in the averments that it was the duty of defendant to keep the hatchway properly covered and to properly replace all hatch covers removed by its servants; and that through defendant's neglect the hatch was not properly covered so that plaintiff's intestate fell through. (Page 3, last three paragraphs).

The declaration also contains in the same count an averment that the hatchway was covered by defendant with a piece of tarpaulin and "was thereby left in such condition that a person not knowing that the hatch was off would have believed it to be properly covered and secured." It does not aver that plaintiff's intestate did so believe or did not know the hatch was off or fell through by reason of its being apparently covered. If these averments had been contained in the count it would have been clearly bad on demurrer as containing two distinct causes of action, —

1. Negligence in leaving the hatch open.
2. Negligence in apparently but not really covering it.

The gist of the first cause of action would be a duty to cover the hatch and negligence in not performing that duty. The gist of the second cause of action would be the imperfect covering, and it would be immaterial whether there was any duty to cover or not. A mere volunteer would be liable as much as one who had a duty in the premises. Inasmuch as the declaration does not contain all the averments necessary to a cause of action based on the imperfect covering, defendant could not demur to the count as containing two causes of action, but treated it as containing only the cause of action fully set forth, viz.: negligently performing a duty to cover; and treated the averment that they covered with tarpaulin as merely a mode of stating negligence in performing the duty to cover, and not a separate cause of action irrespective of duty.

The defendant insists that on this appeal the declaration

must be treated as containing only a single count for negligence in failing to perform a duty to cover; and that in the absence of evidence of a duty to cover the action cannot be be maintained. This position the appellee does not waive in the following discussion.

Inasmuch, however, as all the evidence is reported it will be discussed as if there were a proper count for setting a trap by making a hole look as if it were covered.

Accordingly the appellee respectfully submits:—

I. That it was not the duty of the defendant or of any one else to keep the hatchway closed.

II. That there is no evidence from which a jury would be warranted in finding,—

(*a*) That the open hatchway was so covered with tarpaulin that anyone who did not know that it was open would suppose it to be properly closed.

(*b*) That if it was so covered the defendant's employee was the person who covered it.

III. That, supposing the hatchway to have been negligently left in an unsafe condition by the defendant, the negligence of the deceased and of his servants in leaving it in that condition for hours after they knew it and of the deceased in stepping off the ladder into the hatchway without looking to see whether it was covered or not were subsequent causes which contributed to the injury and were its legal and proximate cause.

I.

There was no duty to close the hatchway, and therefore no negligence in not closing it.

1. The testimony is uniform that the hatchways were left open or covered as the convenience of those using them required.

Russell, a stevedore, says, "I ordered the men to put the

hatches on No. 2 hatch on the steerage deck so as to take in cotton. They did so." (Direct examination, page 5.) "The Orlop deck hatches had been taken off and left off at No. 2 hatchway because we expected to get grain in. If the grain had come we should have taken off a portion of the No. 2 hatch on the steerage deck, and put the pipe down and loaded the hold through the No. 2 orlop hatch, at the same time continuing to use No. 2 steerage hatch to load the bacon." (Cross examination, page 7.) He also says the orlop hatch had been put on to enable the defendants to ice their refrigerator, and then taken off to go into hold.

Sullivan, a stevedore, speaking of the practice of stevedores, says, "If there was a hatch off and they were going to work they would put it on. . . . When the meat men went below and left the hatch open to the knowledge of the stevedores, the stevedores have put it on, and when the meat men have wanted to come up they have knocked and we took it off." (Cross examination, page 9.)

Callahan, a stevedore, testifies: "I got down to the steerage deck at about twenty minutes past seven. . . . When I went down I noticed a light glimmering under this aft starboard corner of the hatch, and I saw that the hatch was off. . . . If I had thought that we would be working on the starboard side, of course I should have put the hatch on. Our work was up forward on the port side. I did not suppose there was any danger of anybody getting down through, and so I did not put it on. If we had been working as we were before six o'clock, we would, of course, have put the hatch on . . . even if somebody had been down below in the hold." (Cross examination, page 11.)

Donovan, a stevedore, testifies: "If we wanted the hatch on for any purpose of our own, we would put it on although they — *i. e.* the meat men — were down below." (Page 16.)

All the above witnesses were employees of plaintiff's intestate.

Bruce, the employee of the defendant company called by plaintiff, says, "I have been down there before, when the stevedores were at work and they have covered me up after I had gone down." (Page 14.)

When, therefore, Bruce found, when he came up, that the hatch was still open, he had a right to assume that the stevedores wanted it open, or at least did not care to have it shut.

The only hatchway that appears to have been closed at all was hatchway No. 2, on the steerage deck, the one where the accident occurred; and that was closed only because the cover was needed for the reception and handling of cotton and bacon, which was afterwards trucked to hatches 1 and 3 for stowage.

It has been repeatedly decided that when the testimony shows that hatches are left open at will, and according to the convenience of those using them, it is not negligence to leave them open.

Dwyer v. *National Steamship Company*, 17 Blatch. 472, 4 F. R. 493.
The "Sir Garnet Wolseley," 41 F. R. 896.
Doyle v. *The "Jersey City,"* 46 F. R. 134.

2. Even in the absence of such testimony it is common knowledge, which the Court will judicially recognize, that there is no duty upon any one to keep the hatchways of a ship in port covered in order to prevent people from falling through them. They are and must be kept open and closed according to the convenience of those using them; and every one having occasion to move about on a ship must satisfy himself that a hatch is covered before he steps on it.

Men must be continually going up and down, cargo must be coming out and in. To replace the hatches when off is a heavy job taking time and strength. Men going down cannot possibly replace them till they come up

again. The necessities of the case require that all engaged in the work of the ship should look out for open hatches and not trust to finding them covered.

Especially was this true in the present case where the plaintiffs having loaded their refrigerator were obliged to have a man frequently going up and down the hatchway to regulate the ice.

He had to look out for an open hatch on the orlop deck when the convenience of the stevedores required it open; and they had to look out for openings in the upper hatches when his duties required him to go down. If they wanted the whole hatch covered they didn't hesitate to cover him in after he had gone down; and if they did not he had a right to assume when he came up that they did not care to have the hatchway covered. In fact it appears that their reasons for not caring were that they were using only one side of it instead of both, and that as they had been earlier they were expecting to load grain into the hold and would then need an opening in the steerage hatch to put the pipe down. (Russell, page 7.)

It is plain, therefore, that there was no duty to cover the hatchway and, of course, no negligence in not doing it.

The following authorities among others support the foregoing reasoning: —

Dwyer v. *National Steamship Co.*, 4 F. R. 493.

Action against owners of steamer for injuries causing the death of the plaintiff's intestate who fell through a hatchway and was killed. Intestate was the employee of a grain elevator and was working on the ship. While arranging the pipe of the grain elevator in the hatch he stepped upon a section of the hatch covering, which tilted under his weight causing him to fall through to the orlop deck.

The cause of the accident was the unsafe way in which the section of hatch covering had been put on by the stevedores; but the claim was that the owners of the ship were bound to make or keep it safe.

The Court directed a verdict for the defendant; finding, as matter of

law based on common knowledge, that such hatch coverings were necessary and were kept on or off according to the necessities of the business; that there is no duty upon the owner of the steamer to maintain the hatchway in a safe condition.

"Hatchways," say the Court, "are well known features and sources of danger on a ship. They are intended to be open a large portion of the time, especially when in port, not only for the purpose of loading and unloading cargo, but also for ventilation. An open hatchway on a ship when provided with the usual combings is not evidence of neglect of duty on the part of the ship owner. On the contrary a ship owner has the right to allow the hatchways of his ship to remain uncovered and unprotected except by the usual combings, and all persons moving upon the decks of a ship are chargeable with notice of the probable presence of open hatchways on the deck." The Court further says, "that the same rule applies to an imperfectly covered hatch, but that if it were otherwise the plaintiff could not recover because there was no evidence that the unsecured section was put in its unsafe position by the defendant. He had the right to omit to cover the hatchway, and the bare fact that it was wholly uncovered or partly uncovered is not sufficient to establish his liability."

The "*Helios*," 12 F. R. 732.

The libellant was injured by falling through an open locker hatch in the between-decks of a vessel which he was helping to load, and it was held that it was negligence in those having charge of the vessel to leave such a hatch open. But the Court carefully distinguish it from the ordinary case of an open hatch.

BROWN, D. J., says: "It was not a hatch for the usual stowage of cargo, *such as stevedores must at their peril look out for* and are presumed to know about."

See also *The* "*Guillermo*," 26 F. R. 921, 922.

The "*Carl*," 18 F. R. 655.

Libellant at work between decks near an open hatch, seeing the hatch in the main deck above closed, supposed the hatches were all going to be closed and that he would be left below; and hurrying to reach the main hatch before it should be covered, fell into the open hatch at his side.

BROWN, D. J. "Unfortunate as the accident was, its immediate and proximate cause seems to me to be clearly the forgetfulness and inattention — that is to say, the negligence — of the libellant

himself. . . . The hatches between decks were, as is usual, rightly left open and unguarded. *The 'Germania,'* 9 Ben. 356; *Dwyer* v. *Nat. S. S. Co.*, 4 Fed. Rep. 493. The workmen employed about them were bound to give heed to them and exercise reasonable care for their own safety. Notwithstanding the improper, and probably merely accidental, covering of the fore-hatch above, this injury could not have happened except through the absence of reasonable attention and care in respect to the open hatch below, with which the libellant was so familiar. This negligence was therefore not merely contributory, but it was the immediate and proximate cause of the accident; the covering of the hatch above was but the preliminary and indirect cause, not necessarily or naturally producing the subsequent fall of the libellant."

The "Gladiolus," 21 F. R. 417.

"Stevedore fell through an open hatch. Held, that the presumption is that his negligence rather than that of the vessel was the cause. The leaving open a common between-decks hatchway, while the vessel is lying in port under ordinary circumstances, is not presumptive evidence of negligence on the part of the ship. This is not only shown to be the custom by the testimony in this case, but it has been so frequently commented upon in decisions as to be too well settled to be questioned. *The "Victoria,"* 13 Fed. Rep. 43; *Dwyer* v. *Nat. Steamship Co.*, 4 Fed. Rep. 493; *The "Carl,"* 18 Fed. Rep. 655; *The "Germania,"* 9 Ben. 356; *The "Helios,"* 12 Fed. Rep. 732. While the falling through an open hatchway by a stranger, a landsman, visitor, or passenger on board a vessel might not be presumptive of negligence on his part, where such accident occurs to a seaman or stevedore, who is accustomed to hatches, their presence, necessity, uses, character and location, the case is different, and unless the circumstances of the particular case are such as to rebut it, the first presumption is of his negligence."

"Sir Garnet Wolseley," 41 F. R. 896.

A night watchman, sitting down upon a hatch assuming it to be covered, fell in and was hurt. Court held that the accident was caused by his own negligence in not looking to see whether it was covered.

Doyle v. *"Jersey City,"* 46 F. R. 134.

Libellant, a carpenter employed by charterers to build a refrigerator between the decks of a steamer on quitting work at midnight,

when about to ascend the ladder, fell through an open hatch at the foot of the ladder, and claimed damages because the hatch was not kept closed or lights maintained about it. Court held that there was no fault in the ship, and that his fall was due to his own negligence in not looking out for the open hatchway. "The open hatch was fully known to him. It was the customary opening, and the only care necessary to avoid it was such ordinary care as all who work on ship-board are expected to exercise. If they do not take such care, it is at their own risk."

II.

There is no evidence from which a jury would be warranted in finding

(*a*) That the opening in the hatchway was covered with tarpaulin at the time Horne stepped into it; or

(*b*) That if it was so covered, it was covered by the defendant's servant.

The only evidence whatever of the position of the tarpaulin between the time when Bruce came up from the orlop and the accident, a space of two hours or more, is that of Donovan, the hatchman, whose duty it was to stand at the port forward corner of hatchway No. 2 on the main deck and guide the fall carrying the cargo down to the steerage hatch. He says, "Where I stood at the forward end of the No. 2 hatch I could see that this after starboard corner of the hatch was off. There was an electric light on the dock over my head. I saw that the hatch was off when I got there at half past seven; I saw that it was off just before Horne went down." (Cross-examination, page 16.)

Donavan stood some distance above the opening and there was at this last mentioned time no light below on the orlop deck, because Bruce had come up long before. The only lights were those on the steerage deck and that on the wharf over the witness' head, so that unless there had been a clear opening not covered by tarpaulin he could not have seen it.

The evidence about the position of the tarpaulin before

Bruce came up and after the accident does not tend to show that it was over the opening, still less that it was there through the defendant's fault.

Bruce, the defendant's employee, says, "When I came at six o'clock, I went down into these ice alleys. All the hatches on the No. 2 steerage hatch were then on. I removed the aft starboard hatch. I took the tarpaulin and spread it back and laid the hatch on top of the tarpaulin. . . . I left the hatchway open. I suppose about two and a half feet by five, or something like that." (Direct examination, p. 12.)

"When I went down this starboard corner of the hatch I did not pull the tarpaulin over it. I left it all open. I left the hatch cover, the section of that corner, lying on top of the other hatch coverings, with the tarpaulin under it." "When I came up I did not take any particular notice as to where the hatch covering and the tarpaulin were. There was nothing to obstruct my going up when I went." (Cross examination, page 14.) "When I came up from the orlop deck to the steerage deck I did not put back the hatch." (Direct examination, page 13.)

We now come to the only piece of evidence that is relied on as showing that the tarpaulin ever covered the opening to any appreciable extent.

In his direct examination, page 10, and in his cross examination, page 11, Callahan testified that when he returned to his work at half past seven he could see a light glimmering under the aft starboard corner of the hatch, and knew that it was off, and that the tarpaulin was well over the hatch but not close up to the combings.

Callahan testifies in his direct examination: "We got back to work at half past seven. . . . As I was going down No. 2 ladder I saw a light in the orlop close to the starboard after hatch underneath the hatchway. I saw it looking

down, as I came down the ladder. It seems the tarpaulin was not close up to the combings of the hatch at that time. . . . I could see the light on the orlop deck because the hatch was off. . . . I mean the starboard aft corner of the hatch was off." (Direct examination, page 10.)

In his cross examination, page 11, he says: "I got down to the steerage deck at about twenty minutes past seven. . . . When I went down I noticed a light glimmering under the aft starboard corner of the hatch, and I saw the hatch was off. The tarpaulin was spread over it, but it was not close to the combings of the hatch; it was pretty well laid over it."

This evidence, however, proves nothing for the plaintiff.

(1) The statement that the tarpaulin was well over the hatch but not quite up to the combings would aptly describe the condition in which Bruce said he left it; for the opening caused by the removal of a single hatch cover is a small space compared with the whole hatch which was covered by the tarpaulin.

(2) The fact that Callahan (who had no reason to suppose that the hatchway was uncovered, since he left it closed when he went to supper and knew that the stevedores were not using it) saw that the hatch was off as soon as he came on board, disproves the plaintiff's allegation, that the hatchway was so covered with tarpaulin that one who did not know it to be open would suppose that it was closed.

(3) If at this time the tarpaulin was well over the opening, Bruce, who was below, cannot have put it there. The ladder leading to the orlop deck where Bruce had to go was on the port side of the centre of the hatchway so that to get at it he had to swing down under the strong-back and the after port hatch. (Haseltine, page 14.) Standing on this ladder with the port hatch cover and the strong-back over him, it would have been impossible for him to throw the tarpaulin over an opening, the end of which must have been

more than five feet from the ladder. If the tarpaulin was thrown over while Bruce was below, it can only have been thrown by one of the stevedores on the hatch.

The dilemma cannot be escaped.

When Callahan saw light glimmering through the corner of the hatch, either the tarpaulin was over the corner through which Bruce had descended or not.

If not the evidence for a trap fails.

If it was, then it must have been put there by the stevedores as it was physically impossible that Bruce could have done it from below.

It is probably for this reason that in his printed brief plaintiff has not relied on Callahan's testimony but on Russell's who says that when he returned from supper he found the hatch as he left it, that the tarpaulin was over it and he *didn't see that any part was uncovered.* But this, in view of the positive testimony of Bruce, Donovan and Callahan of the condition in which the opening really was, simply shows that Russell was not an observant witness.

The only evidence about the position of the tarpaulin after the accident is that of Sullivan, who says in his direct examination, page 8: "I went down the hatch on the steerage deck. Going down I found the tarpaulin was off. It fell down hanging in between the corners of the hatch and the combings. In going down I swung against this tarpaulin and the wind of it knocked my hat off and blew the light out"; and of Hazeltine, who went down soon after him. The latter says in his direct examination, page 14, "I ran forward and went down the ladder of No. 2 hatch as quickly as I could and found there was a hatch off there; I did not wait to take any more off, and I went down and on the way down that tarpaulin was froze stiff; it was down the hatch where somebody had carried it."

Before either of these men went down, Callahan had be-

gun getting the tarpaulin off (cross examination, page 12), and may very well have changed its position.

Had it been left as Bruce says he left it, a man trying to reach the ladder in a hurry would probably have rubbed against it. The ladder, as has been said, was not directly under the opening, but on the port side of the centre of the hatchway, so that to reach it it was necessary to swing under the strong-back and the after port hatch cover. (Page 14.)

Here, again, in view of the positive testimony as to the condition in which Bruce left the opening both when he went down and when he came up; of the fact that two hours had passed since he left the ship; that during all that time the stevedores had been at work on the hatch; and that Callahan had, since Horne fell, been getting off the tarpaulin, the statement that Sullivan and Haseltine in going through the opening brushed against the corner of the tarpaulin hanging down the hatch, would not warrant a finding that Bruce had stretched the tarpaulin over the opening and that Horne had stepped on it and carried it down.

Such a finding would be mere guesswork based on suspicion or prejudice and not a reasonable conclusion from evidence.

III.

Even if a duty to cover the hatchway and a neglect of that duty were proved, or if negligently covering the hole with a tarpaulin were properly pleaded and proved, the plaintiff cannot recover, by reason of the contributory negligence of her intestate and his employees, disclosed by the testimony introduced on her behalf.

Whatever the condition of the hatchway at the time of the accident, and whoever put it in that condition originally, the immediate causes of the accident were, (1) that the deceased and his employees, knowing its condition for two hours before

the accident, left it as it was instead of putting the hatch cover in place; and (2) that the deceased himself carelessly stepped off the ladder on to the opening which he should have known was there.

Some of the stevedores knew that the hatch was open. Donovan, in his cross examination, page 16, and Callahan in his, page 10, testify that two hours before the accident they saw that the hatch was open. Donovan testifies that he saw that it was open just before the accident.

The deceased himself was on the hatch several times in the course of the evening, and had as good an opportunity to see its condition as his men had. It must be presumed that he did see it. (Callahan, page 10, 11.) Whether the deceased knew of it or not, however, Donovan and Callahan did, and if either of them had covered the hatch in a proper way the accident would not have happened.

The deceased and his employees might easily, by the use of reasonable care, have prevented or avoided the accident. Their own negligence, subsequent to defendant's, and contributing to the injury, is therefore its real cause, and no action lies for it against defendant.

Butterfield v. *Forrester*, 11 East, 60.
Schofield v. *C. M. & St. P. R. R. Co.*, 114 U. S. 615.

And see

Little v. *Hackett*, 116 U. S. 366, 371.
The "Bernina," 12 P. D. 58, 62.

In the "Bernina," among the rules laid down by Lord Esher, M. R., governing liability for negligence is the following: —

"8. If, although the defendant or his servants has or have been guilty of negligence, the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against any one."

This Court has held, as matter of law, that it was contributory negligence, defeating plaintiff's right to recover for an injury at a railroad crossing, that he might if he had looked have seen the train in season to stop.

Schofield v. *C. M. & St. P. R. R. Co.*, 114 U. S. 615.

It was equally clear negligence in plaintiff's intestate to step off the ladder on to the hatchway without making sure that the cover was on where he stepped.

"He came right down the ladder and turned right off with his foot on the starboard and went right down in the hold." (Callahan, page 10.)

He took that step at his own peril as much as if he had driven on to a railroad track without looking for a train.

The "Carl," 18 F. R. 655.
R. R. Co. v. *Jones*, 95 U. S. 439.
Griggs v. *Houston*, 104 U. S. 553.

IV.

The evidence, with all legitimate inferences, being insufficient to support a verdict for the plaintiff, it was the duty of the Court to direct a verdict for the defendant, and there was no error in doing so.

Randall v. *B. & O. R. R.*, 109 U. S. 478, 482.
Pleasants v. *Fant*, 22 Wall. 116.
Schofield v. *C., M. & St. P. R. R.*, 114 U. S. 615.
Griffs v. *Houston*, 104 U. S. 553.
Eliot v. *C., M. & St. P. R. R. Co.*, 150 U. S. 245.
U. P. R. R. Co. v. *McDonald*, 152 U. S. 262.
Jackson v. *Metropolitan R. Co.*, 3 App. Cas. 193, 197.

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